BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

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| JUNCTION CITY REDEVELOPMENT GROUP,<br><br>Appellant,<br><br>v.<br><br>SIERRA PACIFIC INDUSTRIES and STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,<br><br>Respondents. | PCHB NO. 03-074<br><br>ORDER GRANTING MOTION FOR STAY OF NPDES PERMIT NO. WA0041017<br><br>DISSENT |

I

This is a difficult case to resolve because neither side did what it was supposed to do. I agree with much of the majority opinion. My colleagues correctly point out Ecology failed to conduct a study of all known, available and reasonable technology ("AKART") as applied to the temperature of the proposed wastewater discharge from the cogeneration facility. This Board has previously ruled Ecology must follow the methodology set forth in federal regulations at 40 CFR 125.3 in the absence of EPA promulgated effluent limitations. *Crown Zellerbach Corporation v. Ecology*, PCHB Nos. 85-223 and 85-242 (July 15, 1986).

II

That is not, however, the end of the analysis. When a stay is requested, an Appellant must demonstrate a likelihood of success on the merits. This test requires the Appellant to show, at a minimum, that the status quo must be maintained until a decision is made upon the merits.

The Appellants wrongly believe it is sufficient for a stay to issue once it demonstrates Ecology has committed an error. A stay is an equitable remedy. The Appellants must make some showing that their interests will be affected if the outfall is constructed and the discharges are allowed to occur under the terms of the proposed stipulated agreement between Ecology and Sierra Pacific. In addition, the Board has routinely required a person challenging an Ecology AKART determination to identify alternative technological means of achieving AKART. The Appellants fail to identify any alternative technologies. I would deny the stay on the basis the Appellants have failed to meet their burden of showing a likelihood of success on the merits.

III

RCW 43.21B.320(3) and WAC 371-08-415 authorize the Board to stay the effectiveness of an order until a decision is rendered on the merits. The person requesting the stay makes a prima facie case for granting the stay by demonstrating either a likelihood of success on the merits of the appeal, or irreparable harm. If a prima facie case is made, the Board grants the stay unless the other party demonstrates either a substantial probability of success on the merits or a likelihood of success on the merits together with an overriding public interest, which justifies denial of the stay.

IV

An extensive recent discussion by the Board regarding the stay criteria is found in *Airport Communities Coalition v. Ecology*, Order Granting Motion to Stay the Effectiveness of Section 401 Certification, PCHB No. 01-160 (Dec. 17, 2001). In *Airport Communities Coalition*, the Board stated:

> A stay is akin to a preliminary injunction and is not an adjudication on the merits, but rather a device for preserving the status quo and preventing irreparable loss of rights before judgment. (Citations omitted).

*Airport Communities Coalition*, page 2.

V

The Board further described the meaning of "likelihood of success on the merits" as one or both sides presenting the Board with justiciable arguments for and against a particular proposition. Rather than a pure probability standard requiring the moving party to demonstrate it will conclusively win on the merits, the moving party must demonstrate only that there are questions "so serious . . . . as to make them fair ground for litigation and thus for more deliberative investigation." (Citations omitted) *Id.* at 2.

VI

The Board stated in *Airport Communities Coalition* the likelihood of success on the merits is evaluated "based on a sliding scale that balances the comparative injuries that the parties and non-parties may suffer if a stay is granted or denied." *Id.* at 2. The Board provided an example of a non-moving party suffering little or no harm or injury if the stay is granted. Under such circumstances, the moving party's burden of showing a likelihood of success on the merits need not be as strong. The Board will also take into account the injuries non-parties may suffer if a stay is granted or denied.

VII

The Board therefore balances the relative interests of the parties, and takes into account the interests of the public under the appropriate circumstances. This test is similar to, but not as

rigorous as the standards enunciated in *Tyler Pipe Indus. v. Dept. of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982), for evaluating stay requests. Under the *Tyler Pipe* test, a person seeking an injunction must show (1) he has a clear legal or equitable right, (2) he has a well-grounded fear of immediate invasion of that right, and (3) the acts complained of are either resulting in or will result in actual and substantial injury to him. The *Tyler Pipe* test is the standard currently used by the Forest Practices Appeals Board in evaluating stay requests. *Rutter v. DNR*, FPAB No. 02-024 (Jan. 31, 2003).

VIII

Unlike the test in *Tyler Pipe*, the Board does not require a person seeking a stay to show a substantial injury will result if a stay is not granted. The *Airport Communities Coalition* test does, however, require the person requesting a stay to show SOME injury. The Board is required to balance the comparative injuries that the parties and non-parties may suffer if a stay is granted or denied. If the Appellants are unable to show any injury if the stay is not granted, there is no reason to preserve the status quo.

IX

This Board also stated in *Airport Communities Coalition* that a stay is akin to a preliminary injunction. In *Kucera v. Dept. of Transportation*, 140 Wn.2d 200, 995 P.2d 63(2000), the Washington Supreme Court chastised the superior court for failing to link the operation of the ferries with an injury to the environment. The court said:

> The trial court's disregard of the traditional prerequisites for entering a preliminary injunction has no basis in either state or federal law and thus constitutes an abuse of discretion.

140 Wn.2d at 218.

X

The *Kucera* opinion also cites with approval various federal cases, which deny injunctive relief even when the courts found NEPA had been violated. 140 Wn.2d at 220. The fact that a violation of the law occurred does not necessarily translate into injunctive relief. The *Kucera* court also quotes *Tyler Pipe* as follows:

> An injunction is an extraordinary equitable remedy designed to prevent serious harm. Its purpose is not to protect a plaintiff from mere inconveniences or speculative and insubstantial injury.

140 Wn.2d at 221 (quoting *Tyler Pipe* at 96 Wn.2d at 796).

XI

Under the facts in this case, a discharge of wastewater at 73 degrees Fahrenheit pursuant to the stipulated agreement between Ecology and Sierra Pacific results in the effluent plume reaching a temperature of 60 degrees Fahrenheit in 0.1 to 7.6 feet downstream of the discharge point. This discharge must be put into perspective. The river in the vicinity of the discharge is approximately 800 feet wide and up to 36 feet deep. Any bull trout or salmonid species using this area for migration can easily avoid the small area of slightly warmer water.

XII

If fish can easily avoid being impacted by the outfall, where is the potential harm to beneficial uses? The Appellants were unable to identify any during questioning by the Board at the hearing. The likelihood of some harm occurring must be demonstrated before a stay can be appropriately issued. This Board has previously held in a case involving both a proposed stay

and AKART, that "statements of concern regarding increased flow and contamination as submitted by the appellants are not sufficient to meet the required showing for a stay." *McKenna v. Ecology*, Order Denying Stay, PCHB No. 00-054 (June 28, 2000).

XIII

The majority relies upon a Hydraulic Project Approval (HPA) issued by the Department of Fish and Wildlife for the installation of the cogeneration outfall as support for its position. This HPA requires the water to be cooled to below 60.8 degrees Fahrenheit before it could be released into the receiving waters. However, the water quality standard for temperature for inner Grays Harbor is approximately 66.2 degrees Fahrenheit. The HPA requires a discharge at a lower temperature than the receiving water. It was argued at the hearing that the temperature established in the HPA was baseless and the HPA was going to be revised. Even without further evidence, the majority should not rely on the HPA as an appropriate indicator of temperature when the HPA on its face establishes a threshold below the temperature of the receiving waters.

XIV

Sierra Pacific testified it was unsure how long the City of Aberdeen would continue to allow the cogeneration facility to discharge effluent into the City's sewage treatment works. The majority dismisses this possibility occurring prior to a hearing on the merits based upon a lack of evidence in the record. This potential harm, however, is at least identified and is more than just speculative. When the parties' comparative injuries are balanced pursuant to the test enunciated in *Airport Communities Coalition*, the Board should find in favor of the Respondents. An identified potential injury, even if remote, carries more weight than no identifiable injury.

XV

In *Airport Communities Coalition*, the Board also examined the standards governing the issuance of Section 401 Certifications in determining the Appellants' likelihood of success on the merits. Likewise here, the Board should examine the standards governing a challenge under AKART.

XVI

Although Ecology considered a lot of information in establishing the allowable temperature for the wastewater discharge, it did not follow the proper steps required for AKART. Again, however, this is not the end of the analysis. The Board has required a person challenging an AKART determination by Ecology to identify reasonable alternatives that meet the components of AKART.

XVII

In *Marine Envtl. Consortium v. Ecology*, PCHB No. 96-257 (June 1, 1998), the Board rejected the Appellants' challenge to net pens as AKART for raising Atlantic salmon. Three different alternatives (floating bag systems, upland tanks, and rigid wall floating tanks) were identified and discussed before the Board. The Board ruled against the Appellants on each proposed alternative because the alternatives were not shown to be technologically feasible or financially feasible. In this case, Junction City Redevelopment Group fails to even identify, let alone discuss any alternative. In response to a Board question at the hearing, they answered that they were unable to say what did constitute AKART without further research.

XVIII

It is not clear what temperature level would constitute AKART in this case. I share the same concerns as my colleagues about Ecology failing to follow the proper procedures in establishing the effluent temperature. I believe, however, whatever temperature is eventually set for the discharge will be fairly close to the 73 degrees stipulated to between Ecology and Sierra Pacific. The Appellants have failed to meet their burden to justify the issuance of a stay. I would deny the stay on the basis of the test balancing the interests of the parties.

Done this 9th day of July, 2003.

POLLUTION CONTROL HEARINGS BOARD

WILLIAM H. LYNCH, Chair